

AMENDMENT AND RESPONSE UNDER 37 CFR § 1.111

Serial Number: 09/884,674

Filing Date: June 19, 2001

Title: SYSTEM AND METHOD FOR AUTOMATIC AND ADAPTIVE USE OF ACTIVE NETWORK PERFORMANCE MEASUREMENT TECHNIQUES TO FIND THE FASTEST SOURCE

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REMARKS

This responds to the Office Action mailed on September 29, 2005, and the references cited therewith.

Claims 1, 8, 19-21, 25 and 28 are amended, claims 12-18 are canceled without prejudice or disclaimer, and no claims are added; as a result, claims 1, 3-11, 19-30 remain pending in this application.

§101 Rejection of the Claims

Claims 8, 12, 15, 18, 21 and 28 were rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter (i.e. a computer-accessible medium, a computer data signal embodied in a carrier wave and a computerized method). The Office Action provides no guidance as to why the claims are considered non-statutory. For the purposes of this response, Applicant will assume that the Examiner is applying the Patent Subject Matter Eligibility Interim Guidelines (hereinafter "Guidelines") in the rejection of claims 8, 12, 15, 18, 21 and 28. According to the Guidelines, the USPTO considers claims to signals per se, whether functional descriptive material or nonfunctional descriptive material, to be nonstatutory subject matter. Applicant agrees with the counterargument presented in Annex IV, which states:

"On the other hand, from a technological standpoint, a signal encoded with functional description material is similar to a computer-readable medium encoded with functional descriptive material, in that they both create a functional relationship with a computer. In other words, the computer is able to execute the encoded functions, regardless of whether the format is a disk or a signal." (see Guidelines at page 57)

However, in order to expedite prosecution, Applicant has amended claim 8 and has canceled signal claims 12-14 and claims 15-18. Claim 8 has been amended to clarify that the computer-readable medium is a tangible medium, thereby excluding signals. Applicant reserves the right to reintroduce the claims directed to and including signals in a continuing application.

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element of claims 1, 8, 25 and 28. Applicant respectfully requests reconsideration and the withdrawal of the rejection of claims 1, 8, 25 and 28.

Claims 17, 21-24 and 30 were also rejected under 35 USC § 103(a) as being unpatentable over Emens et al. and Ramanathan et al. in view of Andrews (U.S. 2002/0038360). Claim 17 has been canceled in this response.

Base claim 21 has been amended to include selectively obtaining an empirical measurement of performance of each of a plurality of sources. As discussed above, neither Emens nor Ramanathan teach or suggest selectively obtaining a measure of performance. Further, Applicant has reviewed Andrews and can find no teaching or suggestion of the recited language. As a result, the combination of Emens, Ramanathan, and Andrews fails to teach or suggest each and every element of Applicant's claim 21. Applicant respectfully requests reconsideration and the withdrawal of the rejection.

In addition to the patentable elements provided by the dependent claims, the dependent claims are believed allowable by virtue of their dependency on an allowable base claim. Accordingly, the rejections of the dependent claims based on the combination of Emens and Ramanathan and the combination of Emens, Ramanathan and Andrews is believed overcome. The Applicants respectfully request removal of the rejections.

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CONCLUSION

Applicant respectfully submits that the pending claims are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (612) 373-6954 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

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By their Representatives,

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Date March 29, 2006

By Rodney L. Lacy

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I hereby certify that this paper is being transmitted by facsimile to the U.S. Patent and Trademark Office on the date shown below.

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March 29, 2006
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